

No. 12283

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM
AVERBUCK, ELVADOR G. GREENFIELD and HORACE MOR-
TON NEWMAN, Jr.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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TOPICAL INDEX.

PAGE

Jurisdictional statement	1
Statement of the case.....	1
Summary of appellants' showing in support of their claim of the privilege against self-incrimination.....	7
1. The purpose of the grand jury investigation (as it had been from its start in October, 1948) was to connect appellants with the Communist Party.....	7
(a) The purpose of the grand jury investigation, as disclosed by Government counsel, was to ascertain the whereabouts of the membership records of the Communist Party so that their production could be compelled	7
(b) The Government had good reason to believe that appellants could give the information Government counsel stated that the grand jury had been seeking since the start of the investigation in October, 1948.....	9
2. Appellants had good reason to fear that this grand jury inquiry was part of the nationwide drive conducted by the Department of Justice against the Communist Party, its leaders and members, under the Smith Act.....	12
3. Appellants showed that the Department of Justice had instituted prosecutions under the Smith Act against the leaders of the Communist Party based upon their formation of the party and their membership therein; and appellants proffered a showing that it had been reported that nationwide prosecution of the Communist Party, begun through grand jury investigations, were imminent in Los Angeles and elsewhere. On the basis of this showing appellants' answers might have placed them in grave immediate peril	15

4. The basis of the claim of privilege against self-incrimination asserted by these appellants is the same in fact and in law as that asserted by the witnesses in the Alexander case (No. 12081), the Kasinowitz case (No. 12217) and the Doran case (No. 12221).....	20
--	----

Argument	21
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The court below erred in ordering appellants to answer the questions put to them before the grand jury and in adjudging and committing appellants, and in sentencing appellants for contempt for their refusal to answer said questions in that under the Fifth Amendment to the Constitution of the United States appellants had the right to refuse to answer said questions on the grounds that answers to said questions might tend to incriminate them.....	21
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Questions of the nature here involved, propounded in the course of an inquiry having the purposes indicated in appellants' showing call for answers which could connect appellants with the Communist Party.....	22
--	----

(1) Questions asking for the identity of persons holding described offices in the Los Angeles County Communist Party	22
(2) Questions asking for the organizational structure and procedures of the Los Angeles County Communist Party	23
(3) Questions designed to develop Dorothy Healey's connection with the Los Angeles County Communist Party..	25
(4) Miscellaneous questions in aid of one or another in the foregoing groups	28

Conclusion	33
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TABLE OF AUTHORITIES CITED.

CASES	PAGE
United States v. Cusson, 132 F. 2d 413.....	29
United States v. Rosen, 174 F. 2d 187.....	28
United States v. Weisman, 111 F. 2d 260.....	29

MISCELLANEOUS

Look Magazine, Aug. 30, 1949.....	14
Los Angeles Examiner, July 21, 1948.....	16
Los Angeles Examiner, Sept. 17, 1948, Washington Scene.....	17
New York Times, Sept. 18, 1948.....	18
New York Times, Sept. 29, 1948.....	18
New York Times, Oct. 15, 1949, p. 1.....	16

STATUTES

Federal Rules of Criminal Procedure, Rule 37(a).....	1
Smith Act, Sec. 371 (18 U. S. C. 2385).....	2
United States Code, Title 28, Sec. 1291.....	1



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BRIEF FOR APPELLANTS.

Jurisdictional Statement.

These are appeals from judgments in criminal contempt of the United States District Court for the Southern District of California, Central Division. Jurisdiction of this Court is conferred by Title 28, United States Code, Section 1291, and Rule 37(a) of the Federal Rules of Criminal Procedure.

Statement of the Case.

Appellants were convicted of criminal contempt for refusal to answer questions before the grand jury. They have been sentenced as follows: Healey to 1½ years in jail; Appelman, Greenfield and Newman to one year in jail each; and Averbuck to a fine of ten dollars.

The grand jury investigation in which these appellants were interrogated was the same as that wherein the appellants in *Alexander et al. v. United States* (9 Cir., No. 12081, decided February 4, 1950), *Kasinowitz et al. v. United States* (9 Cir., No. 12217, decided February 4, 1950, petition for rehearing denied April 21, 1950, and new opinion substituted), and *Doran et al. v. United States* (9 Cir., No. 12221, decided February 4, 1950)* were involved. Appellants were summoned and interrogated for the same purpose as the appellants in the cited cases, and the general objectives of the grand jury's inquiry were the same as in those cases [R. 137, 135-136]. The questions asked of appellants in the case at bar are of the same tenor as those put in the above cases except that they are more detailed and call for a far more intimate knowledge of the internal structure, the procedures, practices and personnel of the Los Angeles County Communist Party. Appellants here, as did those in the prior cases, refused to answer the questions claiming their privilege against self-incrimination. The claim here, as there, is based upon a fear of prosecution under the Smith Act (18 U. S. C. 2385, 371) and is justified upon the same factual setting, somewhat amplified, as in those cases.

The questions for refusal to answer which appellants were found guilty of contempt are set out *seriatim* in the presentments [Appelman, R. 2-4; Averbuck, R. 6-9; Greenfield, R. 11-13; Healey, R. 15-20; Newman, R. 22-25], and all references to them in this brief will be in terms of the numbers assigned them by the grand jury. In the main the questions fall into definable groups as follows:

*The opinions of the Court in these cases have not yet appeared in the official reports.

1. Questions asking for the identity of persons holding described offices in the Los Angeles County Communist Party. These questions were asked in one of two forms: "Do you know who—" (holds the designated office or position); or "Can you tell us the name of —" (the person holding the designated office or position).

Appelman, Nos. 2, 3, 4, 7, 11 [R. 3-4].

Averbuck, Nos. 3, 5, 6, 7, 8 [R. 8-9].

Greenfield, Nos. 1, 8, 10, 11 [R. 12-13].

Healey, Nos. 2, 10, 11, 17, 18, 19, 20, 21, 22, 36 [R. 17-20].

Newman, Nos. 6, 7, 8, 9 [R. 24].

2. Questions asking for the organizational structure and procedures of the Los Angeles County Communist Party. Typical of this group are, "Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?" [Healey No. 19, R. 18] or "Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?" [Healey, No. 13, R. 18] or "Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?" [Healey No. 7, R. 17.]

Appelman, Nos. 5, 6, 8 [R. 4].

Greenfield, Nos. 5, 6, 7, 9 [R. 13].

Healey, Nos. 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16, 23, 24, 25, 26, 27, 28, 29, 30 [R. 17-19].

Newman Nos. 10, 10a, 11, 12, 13 [R. 24].

3. Questions designed to develop Dorothy Healey's connection with the Los Angeles County Communist Party. These questions range from the identical

ones involved in the *Kasinowitz* case, *supra* (Do you know Dorothy Healey?—her business or occupation? [Newman Nos. 1, 2, 3, R. 24]) to such questions as “Did you ever see Mrs. Dorothy Healey with any of the books and records of the Los Angeles County Communist Party?” [Averbuck No. 9, R. 9].

Appelman, No. 1 [R. 3].

Averbuck, Nos. 2, 9 [R. 8, 9].

Greenfield, Nos. 2, 3 [R. 13].

Healey, Nos. 32, 33, 34, 35 [R. 19, 20].

Newman, Nos. 1, 2, 3, 15, 16 [R. 24, 25].

4. Miscellaneous questions in aid of one or another of the foregoing.

Appelman, Nos. 9, 10 [R. 4].

Averbuck, Nos. 1, 10 [R. 8, 9].

Healey, No. 12 [R. 18].

Newman, Nos. 4, 5, 14 [R. 24, 25].

Newman was first brought before the grand jury and interrogated on April 21, 1949 [R. 85, 90-91]. He was at that time excused subject to recall [R. 91]. On May 26, 1949, he was recalled and questioned further [R. 91-98]. It was on the latter date that Averbuck, Greenfield and Healey were first questioned by the grand jury [Averbuck, R. 78-84; Greenfield, R. 73-78; Healey, R. 60-73]. The questions above reviewed, along with others, were put to them and they refused to answer, claiming their privilege. As the result of proceedings on June 9 and 10, 1949, these four appellants (Newman, Averbuck, Greenfield and Healey) were ordered by the District Court to answer the questions set out in the respective presentments

and to be and appear before the Grand Jury on June 14, 1949, for this purpose.

Appellant Appelman was first examined before the grand jury on June 14, 1949 [R. 252-258]. Upon claiming his privilege he was that day ordered to answer after proceedings before the court below [R. 263-4].

All appellants were on June 14, 1949, examined before the grand jury on the questions which the court had commanded them to answer. As to each question they re-asserted their privilege against self-incrimination [Appelman, R. 283-285; Averbuck, R. 286, 289-290; Greenfield, R. 291, 294-296; Healey, R. 297, 303-310; Newman, R. 311-313-315]. Presentments in criminal contempt for their refusal to answer were filed that day [R. 266 ff; Appelman, R. 2; Averbuck, R. 6; Greenfield, R. 11; Healey, R. 15; Newman, R. 22], and appellants were thereupon arraigned, each pleading not guilty [R. 268 ff], and released on bail pending trial [R. 275].

The cases were tried on June 23 and 24, 1949 [R. 275 ff]. By order of the court below they were consolidated [R. 320]. On June 28, 1949, appellants were found guilty and sentenced as stated above [Appelman, R. 359; Averbuck, R. 359; Greenfield, R. 359; Healey, R. 373; Newman, R. 360].*

*The judgments and commitments will be found in the record as follows: Appelman, R. 35; Averbuck, R. 37; Greenfield, R. 38; Healey, R. 40; Newman, R. 42.

The court below denied appellants bail pending appeal [R. 373-4], the reason given being that the appeals presented no substantial question.* Similarly it denied a stay of execution pending application to this court for bail [R. 376, 378]. Appellants were enlarged upon bail pending appeal at the order of Chief Judge Denman [R. 53].

Because the cases of these appellants grew out of the same investigation as that giving rise to the *Alexander*, *Kasinowitz*, and *Doran* cases, *supra*, the court below ordered that the entire record in each of those cases be incorporated in and deemed part of the record in this case [on the motion for an order compelling Averbuck, Greenfield, Healey and Newman to answer, R. 117-118; on the motion to compel Appelman to answer, R. 261; on the trial of the presentments in criminal contempt, R. 316-318]. In their designation of record on appeal herein appellants included the printed records on appeal in those cases [R. 390].**

*This was after the judgments in *Alexander et al. v. United States* (No. 12081) had been affirmed by virtue of the equal division of six judges of this court and before rehearing had been granted and that judgment reversed on February 4, 1950.

**It will be recalled that those records were consolidated and printed in four volumes marked with roman numerals. References in this brief to those records will be preceded by the volume number, thus I R., while references to the record of the proceedings below herein will be in the usual form, thus R.

Summary of Appellants' Showing in Support of Their Claim of the Privilege Against Self-Incrimination.

For purposes of completeness and clarity there is set forth at this point a summary of the showing made in the *Alexander, Kasinowitz* and *Doran* cases, *supra*, all of which is part of the record here, together with the additional material received in the proceedings below against these appellants.

1. THE PURPOSE OF THE GRAND JURY INVESTIGATION (AS IT HAD BEEN FROM ITS START IN OCTOBER, 1948) WAS TO CONNECT APPELLANTS WITH THE COMMUNIST PARTY.
 - (a) The Purpose of the Grand Jury Investigation, as Disclosed by Government Counsel, Was to Ascertain the Whereabouts of the Membership Records of the Communist Party so That Their Production Could Be Compelled.
 - (1) James M. Carter, then United States Attorney in the Southern District of California, together with Max Goldschein, Assistant to the Attorney General, in charge of the grand jury inquiry at which appellants were interrogated, stated to appellant Newman that the purpose of the investigation was to determine whether certain government employees had "told the truth or lied" when they denied membership in the Communist Party. For this purpose, Carter said, it was desired to obtain the membership records of the Communist Party [R. 89]. This, "generally speaking," has been the "purpose of the investigation" since it started in October of 1948 [R. 137].

- (2) As stated in the presentments in the case at bar, “It became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization” [R. 3, 7, 11-12, 16, 23].
- (3) Mr. Goldschein stated in the course of the proceedings below that he believed Dorothy Healey to be a “member of the Communist Party” and that he was trying to establish this so that the government could call upon her to produce those books and records [R. 159-160].
- (4) At one point in the proceedings below appellant Healey was directed as “an organizer of the Communist Party” to produce “all books and records of the Communist Party of Los Angeles County or the Los Angeles County Communist Party. . . .” [R. 70, 72]. She was also served with a subpoena *duces tecum* in somewhat more detailed form [R. 307]. She failed to produce any records, but the government’s motion for an order compelling production was taken off calendar by the court, *sua sponte*, and without objection from the government [R. 248]. Her compliance with the commands to produce records are therefore not involved in the judgment below or this appeal.

(b) The Government Had Good Reason to Believe That Appellants Could Give the Information Government Counsel Stated That the Grand Jury Had Been Seeking Since the Start of the Investigation in October 1948.

(1) A witness named Tony Adrean, produced by the government in the proceedings below of June 10, 1949, testified as follows concerning Dorothy Healey:

—As a former member of the Communist Party for six years he has met and known Dorothy Healey [R. 103].

—Dorothy Healey is organizational secretary and membership director of the Los Angeles County Communist Party [R. 103]. “She has a controlling or executive position in the Communist Party” [R. 104]. As such “she is in control of the day to day activities of the party, the membership, its officers, . . . an authoritative position . . .” [R. 105].

—Dorothy Healey’s office is located in an office building at 124 West Sixth Street on the fifth floor [R. 105].

—The name on the door of the suite of offices of which Dorothy Healey’s office is a part is “Communist Party of Los Angeles County” [R. 106].

—Dorothy Healey is the second in charge of the Los Angeles County Communist Party, directly under the chairman [R. 107].

—Under Dorothy Healey “come the various sections of the party . . . headed by organizers. Under the sections come the various clubs or the basic units of the party” [R. 108].

—The County offices of the party receive certain statistical information concerning each member of the party, including his “party name” [R. 109-111].

—The Dorothy Healey referred to in the witness’s testimony is the appellant Dorothy Healey in these proceedings [R. 106].

- (2) A clerk of an elections board of Los Angeles County and a neighbor of appellant Healey identified her as the person who signed a voter’s registration [Exhibit No. 1, 6/10/49, R. 217] and an elector’s roster [Exhibit No. 2, 6/10/49, R. 219] as “Mrs. Dorothy Ray Healey” [R. 202-207].

An assistant cashier of a Los Angeles bank identified bank signature cards containing authorized signatures for commercial bank accounts of the “Los Angeles County Committee, Communist Party,” address 124 West 6th Street, as well as resolutions of that organization authorizing those signatures. On each appeared the signature of Dorothy Ray Healey as one authorized to sign checks, and another signature, Dorothy Ray Healey as secretary of the aforesaid County Committee [R. 208-213; Exhibit No. 3, 6/10/49, R. 221-222; Exhibit No. 4, 6/10/49, R. 222; Exhibit No. 5, 6/10/49, R. 222-225; Exhibit No. 6, 6/10/49, R. 226-227; Exhibit No. 7, 6/10/49, R. 227-228].

A handwriting expert testified that the signatures of Dorothy Ray Healey on Exhibits Nos. 3-7, *supra*, were made by the same person who signed Mrs. Dorothy Ray Healey on Exhibits Nos. 1 and 2, *supra* [R. 214].

- (3) In the Fourth Report, Un-American Activities in California, 1948, a report of the Joint Fact-Finding

Committee of the California Senate to the regular California Legislature, 1948, are findings that "Dorothy Healey" is organizing secretary of the Los Angeles County "Section" of the Communist Party of the United States [R. 185].

- (4) The House Committee on Un-American Activities has made a similar finding [Exhibit A, p. 26, R. 322].
- (5) In the report of the California legislative committee, *supra*, appellants Averbuck, Newman and Greenfield are found to be officers or members of the Los Angeles Section of the Communist Party [R. 185, 187].
- (6) In the report of the Congressional committee, *supra*, appellants Averbuck and Newman are found to be officers of the Los Angeles Section of the Communist Party [Exhibit A, p. 26, R. 322].
- (7) In a number of articles in Los Angeles newspapers, offered but not received, appellants Averbuck, Greenfield and Healey were identified as officers or representatives of the Communist Party and described as witnesses summoned in the "lengthy investigation into party activities in the county" [Exhibit B, *Idf.*, R. 175; Exhibit C, *Idf.*, R. 178; Exhibit D, *Idf.*, R. 178; Exhibit E, *Idf.*, R. 179; Exhibit F, *Idf.*, R. 180]. The characterization of the grand jury investigation contained in Exhibits B and D (and as quoted herein) was never disclaimed or denied by government counsel.
- (8) After all of the evidence above summarized was in the record the court below, particularly with reference to Exhibit A [R. 322], stated:

"I suppose I should say, while you are on this subject, in view of your statement, that it would

also indicate to me as a judge that these witnesses called before the grand jury by virtue of this public information are persons who could be likely to give the information desired by the grand jury concerning the membership records of the Los Angeles County Committee of the Communist Party, or the Los Angeles County Communist Party, or however it happens to be designated" [R. 325].

(9) Mr. Carter testified that he had made the public statement that he had summoned appellants and the witnesses who had preceded them (*i. e.*, Alexander, *et al.*; Kasinowitz, *et al.*; Doran, *et al.*) because he thought he "could obtain from them the whereabouts of the Los Angeles County Communist Party membership records" [II R. 280-281].

2. APPELLANTS HAD GOOD REASON TO FEAR THAT THIS GRAND JURY INQUIRY WAS PART OF THE NATIONWIDE DRIVE CONDUCTED BY THE DEPARTMENT OF JUSTICE AGAINST THE COMMUNIST PARTY, ITS LEADERS AND MEMBERS, UNDER THE SMITH ACT.

(a) But appellants' showing concerning the nature of the grand jury investigation went beyond the purported inquiry into violation by government employees of the false statement statute. Appellants tried to show a number of statements attributed by the Los Angeles press to Mr. Carter and his associate, Mr. Max Goldschein, a special assistant to the Attorney General, sent out to Los Angeles from Washington, D. C., for this inquiry. These press statements tie in significantly with Mr. Carter's singular reservation in describing the purpose of the inquiry into false statements by government employees. After stating that

the inquiry related to such false statements and the purpose of obtaining the Communist Party membership list, he added that it “did not, of course, refer to anything about the *purpose of the grand jury*. I stated that that was *my purpose* . . .” (emphasis added) [II R. 287]. The press statements are also particularly relevant to other facts appellants sought to adduce concerning the Attorney General’s findings concerning the legality of the Communist Party under the Smith Act and a proposed nationwide crack-down on the Communist Party, its officers and members and affiliates, which will be analyzed, *post*, in Section 3 of this summary.

The proffered press statements of Messrs. Carter and Goldschein are as follows:

- (1) On October 27, 1948, two days following the day and night proceedings of October 25, 1948 (which gave rise to the *Alexander* case, *supra*), the Los Angeles Examiner carried a front page story under the head, “Officials Plan ‘All-Out’ Red Inquiry Here,” which read in part as follows:

“Ten witnesses are jailed for refusing to answer in probe.

“Communist groups and activities in Southern California are scheduled to undergo a ‘top-to-bottom’ investigation by a special Federal grand jury here . . .

“This was indicated by high government officials yesterday after ten witnesses were committed to jail for refusing to answer grand jury questions.

“‘This is only the opening gun in the government’s inquiry into subversive and

disloyal groups,' United States Attorney James M. Carter declared" [II R. 302].

- (2) On the same day, the Los Angeles Times also gave first page prominence to an interview with Carter and Goldschein. This article read in part:

"Scope of the current inquiry into Communist activities is limited to those of government employees at the present time, U. S. Attorney James M. Carter and Max Goldschein, a Special Assistant to the U. S. Attorney General said.

"Both Carter and Goldschein said that in the event the inquiry turns up evidence of Communistic activities other than among Federal employees they will investigate any such cases and prosecute if sufficient evidence is uncovered" [II R. 304].

- (b) An official release of the Department of Justice has described the contempt actions growing out of this very grand jury investigation (that is, *Alexander, et al., v. U. S.*, No. 12081; *Kasinowitz, et al., v. U. S.*, No. 12217; *Doran, et al., v. U. S.*, No. 12221) as "prosecution action in the courts against communists in the United States." This prosecution is stated to be but a part of the government's drive against members of the Communist Party, headed by the prosecution under the Smith Act, of the "members of the Communist National Board" [Exhibit B, R. 344, 345]. The Attorney General in office from the time this grand jury investigation began until after the close of the proceedings below made virtually identical statements in an article written by him in *Look Magazine*, August 30, 1949.

3. APPELLANTS SHOWED THAT THE DEPARTMENT OF JUSTICE HAD INSTITUTED PROSECUTIONS UNDER THE SMITH ACT AGAINST THE LEADERS OF THE COMMUNIST PARTY BASED UPON THEIR FORMATION OF THE PARTY AND THEIR MEMBERSHIP THEREIN; AND APPELLANTS PROFFERED A SHOWING THAT IT HAD BEEN REPORTED THAT NATIONWIDE PROSECUTION OF THE COMMUNIST PARTY, BEGUN THROUGH GRAND JURY INVESTIGATIONS, WERE IMMINENT IN LOS ANGELES AND ELSEWHERE. ON THE BASIS OF THIS SHOWING APPELLANTS' ANSWERS MIGHT HAVE PLACED THEM IN GRAVE IMMEDIATE PERIL.

(a) The indictment returned in the Southern District of New York against 12 persons, being the same as those identified as the "National Secretariat" of the Communist Party with which appellants were connected by the Congressional and California Legislative Committees (see *ante*, section 1(b)(3)-(6) of this summary). This indictment charges that the leaders of the Communist Party

" . . . did conspire . . . to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" (This document was received in evidence in the *Alexander* case as Exhibit A [IV R. 51]. It is set out in full at II R. 327. It was rejected as immaterial in the *Kasinowitz* and *Doran* cases [II R. 295, 296]. Since the records of all three cases are incorporated in the record at bar, the document may properly be considered as in evidence here.)

- (b) The indictments brought in the Southern District of New York against the same 12 persons individually charging each of them with membership in the Communist Party, knowing its purposes to be as alleged in the conspiracy indictment. (This document was received in evidence in the *Alexander* case as Exhibit B [IV R. 54]. It is set out in full at II R. 331. It was rejected as immaterial in the *Kasinowitz* and *Doran* cases [II R. 296]. Since the records of all three cases are incorporated in the record at bar, the document may properly be considered as in evidence here.)
- (c) Extract from the docket of the United States District Court for the Southern District of New York showing that in the cases referred to above the motion to dismiss was overruled [II R. 297, 332]. At the time of the proceedings below these cases were being tried, and the trial court, by overruling various motions made at the conclusion of the government's case, indicated that it was satisfied that the prosecution had proven a *prima facie* case (New York Times, May 21, 1949). Since then, of course, the defendants in those cases were convicted and sentenced to long prison terms (New York Times, October 15, 1949, p. 1).
- (d) An article in the Los Angeles Examiner for July 21, 1948, on the arrest of the leaders of the Communist Party in connection with the New York indictments just referred to. The article refers to the New York proceedings as "the greatest crackdown on Com-

munists in the nation's history." Near the end of the article appears this significant passage:

"Local Federal attorneys indicated that the indictment and arrest of Foster may be the forerunner of a possible nationwide roundup of all American Communist Party members, or persons known to be associated in Communist activities." [Ex. D. Idf., II R. 335-336; offered and rejected as immaterial, II R. 297-298.]

- (c) An article in the Los Angeles Examiner for September 17, 1948, entitled, "Washington Scene" and apparently as syndicated columnist's story on the plans of the Department of Justice. The portions pertinent here follow:

"The Democrats, through Attorney General Tom Clark, plan a sensational attempt to take the anti-Communist play away from the Republicans in the next few weeks.

"The Department of Justice will seek indictments against well known Communists in key cities all over the country . . .

"The Department of Justice will make a big production out of it. The Attorney General will let it be known his investigators have been on their toes all along, but were only waiting for the time to be ripe before making their spring.

"The move, it is hoped, will have great political effect. It is designed to overplay and overshadow any cracks Dewey might make on Administration laxity in prosecuting enemies of the country . . ." [Ex. E, Idf., II R. 337; offered and rejected as immaterial, II R. 299-300.]

- (f) An article from the New York Times, of September 29, 1948, setting forth the text of a speech by President Truman, portions of which are:

“My Administration has been steadily and successfully fighting Communism. We have acted instead of just talking about it . . .

“The FBI, the greatest counter-espionage organization in the world, headed by J. Edgar Hoover, is alert, vigorous and skillful. It is watching the Communists closely and systematically protecting our internal security . . .

“On the basis of evidence collected by the FBI and submitted to the grand jury, twelve top Communist leaders will go to trial in New York on October 15th. We have prosecuted and we shall prosecute subversive activities wherever we find them. But we must have real evidence. We cannot use speeches of Republican politicians as evidence.” [II R. 308.]

That the threat of a nationwide drive against members of the Communist Party involved Los Angeles specifically and therefore presented a direct and immediate threat to people in that community, appears from the showing proffered by appellants in the next succeeding paragraphs.

- (g) An article from the New York Times, dated September 18, 1948, setting forth a letter to Attorney General Tom Clark from Senator Ferguson, chairman of a United States Senate investigating committee, “making urgent request that the Department of

Justice take action seeking indictments against known Communists . . .” The Senator added that evidence in the possession of his committee and the Department of Justice “constitute in my opinion—and I am speaking as a lawyer of some experience—a more than adequate basis for such indictments.” [Ex. I, Idf., II R. 305-306.]

(h) The same article included this paragraph:

“As this demand came by letter, it was reported from an apparently responsible source that the Justice Department already had decided to assemble grand juries in Washington, Denver, Salt Lake City, Dallas, Los Angeles and San Francisco for intensive inquiry into Communist activities. These were the cities which Senator Ferguson suggested as possible spawning grounds for indictment against Communistic activities which may have threatened national security.” [Ex. I, Idf., II R. 305-306.]

(i) In this connection, there is to be considered the public statements attributed to Messrs. Carter and Goldschein, on October 27, 1948, after the grand jury investigation in Los Angeles had begun with the parting of the witnesses in the *Alexander* case. These statements were to the effect that the grand jury was engaged in a “top-to-bottom investigation” of “Communist activities,” which was only an “opening gun in the government’s inquiry into subversive and disloyal

groups” and that evidence of Communistic activities, if sufficient, would lead to prosecution. [See section 2 of this summary and II R. 302, 304.]

- (j) Stipulation that the California Legislative Committee on Un-American Activities, referred to above, had found that the Communist Party advocated the overthrow of government by force and violence [II R. 294; rejected as immaterial, II R. 295]. The Congressional committee has reached similar findings. [See Ex. A, R. 322, Questions and Answers numbered 3, 47, 50, 51, 69, 70.] Each committee made these findings with respect to the Communist Party with which it had connected appellants Healey, Averbuck, Greenfield and Newman in this case. (See this summary, section 2(b)(3)-(6), *ante*.)

4. THE BASIS OF THE CLAIM OF PRIVILEGE AGAINST SELF-INCRIMINATION ASSERTED BY THESE APPELLANTS IS THE SAME IN FACT AND IN LAW AS THAT ASSERTED BY THE WITNESSES IN THE ALEXANDER CASE (No. 12081), THE KASINOWITZ CASE (No. 12217) AND THE DORAN CASE (No. 12221), SUPRA [R. 117-118, 261, on the motion to compel these appellants to answer; R. 316-318 on the trial of the criminal contempt case].

ARGUMENT.

I.

The Court Below Erred in Ordering Appellants to Answer the Questions Put to Them Before the Grand Jury and in Adjudging and Committing Appellants, and in Sentencing Appellants for Contempt for Their Refusal to Answer Said Questions in That Under the Fifth Amendment to the Constitution of the United States Appellants Had the Right to Refuse to Answer Said Questions on the Grounds That Answers to Said Questions Might Tend to Incriminate Them. [Statement of Points upon which Appellants Intend to Rely on Appeal, Point 1, R. 50, 380.]

Because, as will be developed below, the issues presented in this appeal are identical with those disposed of by this court in the *Alexander*, *Kasinowitz* and *Doran* cases, *supra*, and to save repetition, we here incorporate by this reference Appellants' Brief in the *Alexander* case and Appellants' Brief and Reply Brief in the *Kasinowitz* and *Doran* cases. The argument below will be confined to analysis showing that the claim of privilege here rests upon substantially the same facts and the same legal principles as those urged to the court and adopted by it in those cases.

Questions of the Nature Here Involved, Propounded
in the Course of an Inquiry Having the Purposes
Indicated in Appellants' Showing Call for An-
swers Which Could Connect Appellants With the
Communist Party.

- (1) *Questions asking for the identity of persons holding described offices in the Los Angeles County Communist Party* (Appelman, Nos. 2, 3, 4, 7, 11 [R. 3-4]; Averbuck, Nos. 3, 5, 6, 7, 8 [R. 8-9]; Greenfield, Nos. 1, 8, 10, 11 [R. 12-13]; Healey, Nos. 2, 10, 11, 17, 18, 19, 20, 21, 22, 36 [R. 17-20]; Newman, Nos. 6, 7, 8, 9 [R. 24]).

These questions are no different for present purposes from the question "Do you know the names of the county officers of the Los Angeles County Communist Party?" put to the witnesses in the *Alexander* case (No. 12081), *supra*, and to certain of the witnesses in the *Doran* case (No. 12221)* *supra*. The questions put to appellants here seek the same information in more detailed form. In lieu of asking one overall question seeking the names of all the officers of the Los Angeles County Communist Party the prosecutors in this case broke the questions down. Appelman was successively asked, do you know who the chairman is (No. 2), who the membership director is (No. 3), who the financial director is (No. 4), the section organizers (No. 7), who was in charge (No. 11). Averbuck was asked successive questions concerning chairman, "membership or social organizers," "financial organizers or financial directors" of the divisions of the Communist Party (Nos. 5, 6 and 7), concerning any divisional official who has membership records of that

*See questions numbered 1 and 13 in Appendix A-2 of Appellants' Brief in that case.

division (No. 8) and who has the books and records of the county organization (No. 3). Greenfield and Newman were asked similar questions. Healey was asked questions of the same nature but with greater specificity as to the particular divisions concerning which the information was desired.

It was urged to this court in the *Alexander* and *Doran* cases, *supra*, that an answer to the general question, "Do you know the names of the county officers of the Los Angeles County Communist Party?" might be incriminating. This, because an admission of *knowledge* of these things might, in the context there shown, constitute either some proof in the probative chain establishing membership or affiliation or some other form of association with the Communist Party actionable under the Smith Act. *A fortiori* does this apply to a line of questions calculated to develop similar information but in a more specific and detailed form and concerning subordinate officers *knowledge* of whom is more likely to be obtainable only through some form of participation in the affairs of the organization itself. We incorporate at this point pages 18-22 of Appellants' Brief in the *Alexander* case and pages 45-49 of Appellants' Brief in the *Kasinowitz* and *Doran* cases.

The decisions of this court in the *Alexander*, *Kasinowitz* and *Doran* cases are determinative of this aspect of the case.

(2) *Questions asking for the organizational structure and procedures of the Los Angeles County Communist Party* (Appelman, Nos. 5, 6, 8 [R. 4]; Greenfield, Nos. 5, 6, 7, 9 [R. 13]; Healey, Nos. 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 23, 24, 25, 26, 27, 28, 29, 30 [R. 17-19]; Newman, Nos. 10, 10a, 11, 12, 13 [R. 24]).

These questions taken together are essentially the same as the questions "Do you know the table of organization and duties of the Los Angeles County Communist Party?" put to the witnesses in the *Alexander* case, *supra*, and the question "Do you know the organizational set up of the Los Angeles County Communist Party?" put to the witnesses in the *Doran* case, *supra*. In this connection, as with the group of questions just discussed, the prosecutor, rather than asking one or two broad questions covering the entire field, as was done in the prior cases, asked a series of separate questions the total effect of which would have been to elicit the same information. Thus the questions in this group directed to Appelmann inquired concerning the sectional subdivisions of the Los Angeles County Communist Party and the title of their officers; Greenfield's questions dealt similarly with the divisional echelons of the same organization. The questions put to Healey related to the organizational chart of the county organization of the Los Angeles County Communist Party (Nos. 3-9, 30), with the divisional organization of the Los Angeles County Communist Party (Nos. 13, 14, 23-29), and with the numbers of sections, clubs and squads (Nos. 15 and 16). All of the questions put to Newman in this category dealt with the table of organization on the county level only.

Here as with the first group of questions discussed above the interrogation sought knowledge on the part of appellants of the internal workings of the Los Angeles County Communist Party which could have come from close association with the organization and familiarity with its affairs. It was urged in the *Alexander*, *Kasinowitz* and *Doran* cases that to admit having knowledge of the "table or organization and duties" of this organization

(or of its "organizational set up") would be incriminating in the setting established, because such answers could be used with other facts to prove association with the Communist Party culpable under the Smith Act. Far more so would answers to the questions in the case at bar which seek out knowledge of the organizational set up of virtually the entire organization from the top county officers down through divisions and sections, clubs and squads.* We here incorporate the same portions of Appellants' Briefs in the *Alexander* and the *Kasinowitz* and *Doran* cases referred to in the preceding discussion. On this group of questions the decisions of this court in those cases are controlling.

- (3) *Questions designed to develop Dorothy Healey's connection with the Los Angeles County Communist Party* (Appelman, No. 1 [R. 3]; Averbuck, Nos. 2, 9 [R. 8, 9]; Greenfield, Nos. 2, 3 [R. 13]; Healey, Nos. 32, 33, 34, 35 [R. 19, 20]; Newman, Nos. 1, 2, 3, 15, 16 [R. 24, 25]).

It is to be recalled that one of the purposes of the grand jury's inquiry was to establish from these appellants that Dorothy Healey was organizing secretary of the Los Angeles County Communist Party and had custody or control of its membership records so that production of those records could be accomplished. (See Sec. 1(a) of the Summary of Appellants' Showing, *ante.*) Moreover,

*The government's witness Adrean testified to the organizational set up of the Los Angeles County Communist Party, describing and naming certain of the top county officers, explaining the sectional and club subdivisions [R. 107-109]. He spoke from personal knowledge based on former membership [R. 103, 111]. The questions put to appellants, therefore, called for knowledge of that which the government could prove actually existed and answers could therefore be patent evidence of appellants' association with the Communist Party.

the government produced considerable evidence to the effect that Dorothy Healey held that position and had such custody. (See Sec. 1(b) of the Summary of Appellants' Showing, *ante*.) Certain of the questions put to appellants are identical with those involved in the *Kasinowitz* case, *supra*. They ask "Do you know Dorothy Healey?" [Averbuck, No. 2, R. 8; Newman, No. 1, R. 24], or "Do you know her office address?" or ". . . her business or occupation?" [Newman, Nos. 2, 3, R. 24]. We here incorporate pages 27-38 of Appellants' Brief in the *Kasinowitz* case. The decision of this court in the *Kasinowitz* case supports the claim of privilege here.

The other questions in this group on their face call upon appellants to testify in some detail concerning Dorothy Healey's official connection with the Los Angeles County Communist Party. Thus, Averbuck was asked whether he had "ever seen Mrs. Dorothy Healey with any of the books and records of the Los Angeles County Communist Party" [No. 9, R. 9]. Greenfield was asked, "Does she have the books and records of the Los Angeles County Party, do you know" [No. 3, R. 13]. Newman was asked whether he knew Dorothy Healey to be the organizational secretary of the Communist Party of Los Angeles County and whether she has "in her possession or under her control" any of the records of that organization [Nos. 15 and 16, R. 25]. *Knowledge* on such subjects could come from participation in the affairs of the Los Angeles County Communist Party, and in light of the showing here made, any knowledge on appellants' part

probably does have such a basis. It is therefore plain that answers to these questions could have furnished evidence to be used to connect appellants by membership or affiliation with the Communist Party. The decisions of this court in the *Kasinowitz* and *Doran* cases, *supra*, completely dispose of these issues.

Healey was asked a series of questions which either on their face, or in light of the facts produced by the government itself through the witness Adrean (see Summary of Appellants' Showing, Section 1(b)(1), *ante*), called for her to identify herself as the organizational secretary of the Los Angeles County Communist Party or otherwise in charge of its records.

There remains one question, put to Greenfield in this form, "Was that the first time you ever saw her?" [No. 2, R. 13]. Examination of the grand jury transcript shows that the question referred to Dorothy Healey. Greenfield was asked, "Do you know Dorothy Healey?" [R. 73]. He answered that he knew she was "connected with this case"—"I know she is out here in the anteroom" [R. 75]. It was then that he was asked, "Was that the first time you ever saw her?" [R. 75]. Patently the prosecutor was trying to establish some other association between Greenfield and Healey. A negative answer to this question might well have led to a question as to whether, like the witness Adrean, for example, Greenfield had met or seen Healey at a meeting of the Communist Party or at the Communist Party office at 124 West 6th Street. The answer to the question, therefore, could have produced at least an evidentiary lead to facts connecting Greenfield with the Communist Party. The claim of privilege is therefore good.

(4) *Miscellaneous Questions in Aid of One or Another in the foregoing groups* (Appelman, Nos. 9, 10 [R. 4]; Averbuck, Nos. 1, 10 [R. 8, 9]; Healey No. 1 [R. 17]; Newman, Nos. 4, 5, 14 [R. 18]).

At the outset it should be noted that all questions directed to each of the appellants were part of the inquiry seeking the whereabouts of the Communist Party membership records and thus proximately connecting appellants with that organization. Taken out of this context the questions in this group would have no materiality. Since they are part of such a line of questions, appellants' privilege is available to them on the basis of the showing made delineating the risk of prosecution which the interrogation as a whole has created for them (see *United States v. Rosen*, 2 Cir., 174 F. 2d 187, 192).

Appelman was asked where he had used the name Matt Pelman before [No. 9, R. 4]. Each of these appellants was summoned because the prosecution thought he knew the whereabouts of the membership records of the Communist Party, and the court below was impressed that appellants "would be likely to give the information desired" (see Summary, *ante*, Sec. 1(b)). It is therefore quite probable that Appelman is or was a member or affiliate of the party. The witness Adrean testified that members went by "party names" for "security reasons" [R. 109]. It is reasonable to suppose, then, that Matt Pelman may have been Max Appelman's party name. The question may well have called for just such a disclosure and its incriminating nature is therefore quite apparent.

Appelman was also asked whether he had ever been to the Los Angeles offices of the Los Angeles County Committee of the Communist Party [No. 10, R. 4]. The incriminating possibilities of an affirmative answer to this question need no elaboration (*United States v. Cusson*, 2 Cir., 132 F. 2d 413).

Averbuck was asked what name was on the door on an office he worked out of at 124 West 6th Street in Los Angeles [No. 1, R. 8]. He testified that the office was on the fifth floor at that address* [R. 78]. The government's witness Adrean testified that the offices of the Los Angeles County Communist Party are located at 124 West 6th Street in Los Angeles, on the fifth floor, and that the name on the door is "Communist Party of Los Angeles County" [R. 105, 106]. Averbuck's answer may well have named this office as the one he worked out of. Plainly, Averbuck set the door sufficiently "ajar" (*United States v. Weisman*, 111 F. 2d 260, 262) to show that his answer might connect him with the Communist Party and thereby endanger him under the government's application of the Smith Act.

Averbuck was also asked for whom he was an organizer [No. 10, R. 9]. Healey was asked the same question [No. 1, R. 17]. In view of what has just been said and the entire setting of this question, every reason ap-

*The printed record contains a typographical error rendering the address as "124 West 68th Street." It should read, as in the original transcript, "124 West 6th Street."

pears to follow the earlier decision of this court on this question in the *Alexander*, *Kasinowitz* and *Doran* cases, *supra*.

Newman was asked for his business address, "who" he was educational director for and whether he reports "to anybody who you see?" [Nos. 4, 5, 14, R. 24, 25]. Given the "public information" [R. 325] to the effect that Newman is an officer of the Communist Party in Los Angeles and his selection by the prosecutor as one who is likely to know the whereabouts of the Communist Party membership records, it is reasonable that Newman's answers to these questions would place his business address at 124 West 6th Street, Los Angeles, on the fifth floor, describe his position as educational director for the Los Angeles County Communist Party and his superior as Dorothy Healey, who according to Adrean is second in command there [R. 107]. The likely danger from answers to these questions is therefore rather obvious.

There remains but one general observation to be made concerning appellants' fear of incrimination under the Smith Act from answers connecting them with the Communist Party or providing leads to evidence making such a connection. Appellants have shown a rational basis for fear of being involved in a nationwide prosecution of Communists under the Smith Act. (See Summary, *ante*, Secs. 2 and 3.) Their fears were not merely reasonable under the circumstances, they were a completely accurate portrayal of the government's plans. That this is so was confirmed by events occurring after the trial below. On January 12, 1950, one Raymond P. Whearty, an acting Assistant Attorney General, Criminal Division, testified before a sub-committee of the House Appropriations Committee concerning the 1951 appropriations for the Department of Justice. He testified that the Criminal Division now has ready for prosecution some 12,000 cases against "members of the Communist Party who can be shown to be sympathetic and appreciative of its views." Excerpts from his testimony follow:

"*Mr. Whearty:* The bulk of the cases involve subversive activity as applied to individuals or organizations. By that I mean persons who are active members of the Communist Party and similar organizations, or who appear to be acting in concert with Russian interests. Does that answer your question sufficiently?"

* * * * *

"I should also say that with respect to many of these persons engaged in subversive activities, such

as the Communist case in New York, in line with our appearance before the committee last year, there is a program of extensive suits to prosecute members of the Communist Party who can be shown to be sympathetic and appreciative of its view. We prosecute them as individuals under the Smith Act.

“I will call your attention to the fact that in New York the defendants in the Communist trials have been directed to file their briefs before the circuit court of appeals by May 1, which happens to be May Day, although I do not suppose the court considered that angle of it, but if they fail to appeal then their plea is going to be dismissed. The meaning of that is that the appeal is going to be argued in this term of court. I feel that if the case is decided in the lower court, it will be in the Supreme Court of the United States next fall. I cannot conceive of the Supreme Court not taking this case, and we will have an ultimate decision one way or the other. If the Government is sustained in the Supreme Court of the United States, it will be about the fiscal year 1951 when that program will come up. That is the work load which we must look forward to as possible, and indeed very probable.

“*Mr. Rooney:* Of the 21,105 cases now pending, how many of them would you say depend upon the outcome of the Communist trial in New York?

“*Mr. Whearty:* Roughly, 12,000.”

(Testimony of Mr. Raymond P. Whearty, Acting Assistant Attorney-General, Criminal Division, on Thursday, January 12, 1950, before the Subcommittee on Appropriations, House of Representatives, on Department of Justice Appropriations for 1951, 81st Cong., 2d Sess., p. 86.)

It is therefore established that nationwide prosecutions under the Smith Act against Communists are definitely projected by the government and that this drive only awaits final affirmance of the convictions of the National Board of the Communist Party. Appellants' peril from the grand jury investigation here involved is plain and immediate.

Conclusion.

The judgments below should be reversed and the criminal contempt proceedings against appellants dismissed.

Respectfully submitted,

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